Calendar No. 453

98TH CONGRESS, 1st Session | SENATE | REPORT No. 98-262

AMENDING SECTION 8(a) OF THE SMALL BUSINESS ACT

OCTOBER 4 (legislative day, OCTOBER 3), 1983.—Ordered to be printed

Mr. WEICKER, from the Committee on Small Business, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1022]

The Committee on Small Business, to which was referred the bill (S. 1022) to amend section 8(a) of the Small Business Act, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends the bill, as amended, do pass.

I. COMMITTEE CONSIDERATION

S. 1022, a bill to amend section 8(a) of the Small Business Act to treat businesses owned by American Indian tribes as socially and economically disadvantaged small business concerns, was introduced by Senator Andrews on April 27, 1983 and referred to this Committee.

On May 11, 1983, Senator Weicker chaired a hearing of the Small Business Committee on the bill. At the hearing, the Committee received testimony from Senator Andrews, representatives of Indian tribes and tribally-owned businesses and the Small Business Administration (SBA).

All of the witnesses supported the bill's central intent, which is to clarify that tribally-owned businesses are, and should be, eligible to participate in the SBA's section 8(a) program. The testimony was unanimous that those tribally-owned businesses admitted to the program in the past, on a case by case basis, have found it to be a valuable resource for stimulating business formation and economic activity, particularly on remote Indian reservations. All agreed that the benefits of the 8(a) program should be available to other eligible tribally-

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owned businesses. While the Administration supported the need for a legislative clarification of the issue of tribal eligibility, it recommended that the bill be amended to assure that the same considerations applied to applications from businesses owned by individual Indians and other "socially and economically disadvantaged persons" be applied to applications from tribally-owned companies.

The Committee met in executive session on September 20, 1983, and with a quorum present, favorably reported S. 1022 with an amendment in the nature of a substitute.

Also considered by the Committee was a Dixon amendment to provide that under section 8(d) of the Small Business Act, prime contractors would be required to establish goals for subcontracting with women-owned business enterprises and, under section 15 of the Act, Federal agencies would be required to set overall procurement goals for women-owned firms. After a discussion on the implications of the amendment, it was agreed that Committee staff would study the possible impact of the proposal in more detail. With this understanding, Senator Dixon withdrew the proposal without prejudice, and said that he would offer it again when the bill is considered by the Senate.

Other matters discussed during consideration of S. 1022 included issues raised by Senator D'Amato at the May 11, 1983 hearing, regarding SBA's authority to add Hasidic Jews to the groups presumed to be socially and economically disadvantaged for purposes of the 8(a) program. The Committee's concerns with regard to the level of participation of Hasidims in the 8(a) program are articulated at the end of this report.

Senator Baucus had also intended to offer an amendment to the legislation. During the Committee session, he expressed concerns that Indian tribally-owned businesses, which often operate in isolated locations and lack access to non-Federal contracts, should not be subject to the same requirements as other 8(a) participants. Senator Baucus did not offer his amendment in Committee, but asked that his views on this matter be included in this report. Those additional views may also be found at the end of this document.

The Committee amendment, as reported, is as follows:

Strike all after the enacting clause and insert the following:

That (a) section 2(e)(1)(C) of the Small Business Act (15 U.S.C. 631(e)(2)(C) is amended by inserting "Indian tribes," after "Native Americans,".

(b) Paragraph (4) of section 8(a) of the Small Business Act (15 U.S.C. 637(a)) is amended to read as follows:

"(4)(A) For purposes of this section, the term 'socially and economically disadvantaged small business concern' means any small business concern which meets the requirements of subparagraph (B) and—

"(i) which is at least 51 per centum owned by—

"(I) one or more socially and economically disadvantaged individuals, or

"(II) an economically disadvantaged Indian tribe, or

"(ii) in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by—

"(I) one or more socially and economically disadvantaged individuals, or

"(II) an economically disadvantaged Indian tribe.

"(B) A small business concern meets the requirements of this subparagraph if the management and daily business operations of such small business concern are controlled by one or more—

"(i) socially and economically disadvantaged individuals described in subparagraph (A)(i)(I) or subparagraph (A)(ii)(I), or

"(ii) members of the economically disadvantaged Indian tribe described in subparagraph (A)(i)(II) or subparagraph (A)(ii)(II).".

(c) Paragraph (6) of section 8(a) of the Small Business Act (15 U.S.C. 637 (a)) is amended by adding at the end thereof the following new sentence: "In determining the economic disadvantage of an Indian tribe, the Administration shall consider, where available, information such as the following: the per capita income of members of the tribe excluding judgment awards, the percentage of the local Indian population below the poverty level, and the tribe's access to capital markets.".

(d) Subsection (a) of section 8 of the Small Business Act (15 U.S.C. 637) is amended by adding at the end thereof the following new paragraph:

"(13) For purposes of this subsection, the term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act) which—

"(A) is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or

"(B) is recognized as such by the State in which such tribe, band, nation, group, or community resides.".

Amend the title so as to read:

A bill to amend section 8(a) of the Small Business Act to clarify the eligibility of small business concerns owned by Indian tribes.

II. Legislative History

PUBLIC LAW 95–507

Since 1968, the Administration has used the general authority under section 8 of the Small Business Act as the means for awarding Federal procurement contracts to minority-owned businesses. In response to public disclosures that some contractors had abused the program by establishing "front companies", and congressional hearings which concluded that the program lacked focus, Congress began searching for ways to restructure the program as a development program for minority contractors. In 1978, Congress enacted Public Law 95–507 which, among other things, provided a statutory basis for the Small Business Administration's section 8(a) minority business development program and established new eligibility criteria for firms applying for certification under the program.

Under that law, Congress established, within SBA, the Office of Minority Small Business and Capital Ownership and Development (MSB-COD), headed by an Associate Administrator. The office was given the direct responsibility for certifying firms into 8(a) and for administering the program. In addition to contract assistance, the Associate Administrator was also given the statutory authority under section 7(j) of the Act to provide management and technical assistance to 8(a) firms. By combining in one office the resources to provide financial, management, and contract assistance, the Congressional intent was to design a total program that would foster true business development opportunities for persons who had been traditionally outside the economic mainstream.

The amendments to the 8(a) program made by P.L. 95–507 also changed the criteria for admission of firms to the program. To prevent further abuses through the use of so-called, "front companies", the new law required that fifty-one percent of each applying small business be owned by socially and economically disadvantaged persons.

Furthermore, those individuals were required to be responsible for the daily management, control, and operation of the business. Through those reforms, Congress sought to ensure that the business development benefits of this program flowed directly to truly socially and economically disadvantaged persons.

Under P.L. 95–507, Blacks, Hispanics, and Native Americans (Asian-Pacific Americans were added in 1980 by P.L. 96–302) were designated as being socially disadvantaged. Individuals who were not members of one of those groups, nevertheless, were permitted to petition SBA and establish their social disadvantage on a case-by-case basis. Since 1978, only one group, East Asian Indians, has been so added.

With respect to economic disadvantage, the law did not presume that any business was economically disadvantaged, but rather required that each applicant individually demonstrate its economic disadvantage.

Although the eligibility of tribally-owned businesses to receive loans under SBA's general business loan program was addressed in P.L. 95–507, the law did not specifically address their eligibility under the 8(a) program. Since the enactment of the law in 1978, there has been some confusion about the eligibility of businesses owned by tribes, as opposed to businesses owned by individuals, to participate in the 8(a) program.

NEED FOR THE LEGISLATION

Background

For some time, the Federal government's Indian policy has been to recognize the sovereignty of tribal governments and the responsibility of each tribal government to promote the well being of its members. This was most recently reaffirmed in a January, 1982 policy statement by President Reagan. Furthermore, the President's statement called for economic self-determination and self-sufficiency of American Indians.

During the mid-seventies, some Indian tribes formed corporations as a means of providing a vital source of employment for their members, particularly on remote reservations. Over the years, several of these tribally-owned companies have been admitted to the 8(a) program and have relied on the contracts awarded through 8(a) as their principal, or only, source of work. In some instances, the businesses were established as a joint venture between the tribe and a major corporation.

Prior to the enactment of P.L. 95–507, there was no requirement that an Indian tribe have majority ownership of the corporation in order to receive 8(a) contracts. Furthermore, there were no requirements that Indians manage or control the business, and often the businesses operated under management agreements which placed non-Indians in control.

P.L. 95–507 mandated that Indian ownership of businesses admitted to the 8(a) program be increased to comply with the new program requirements and that SBA closely review existing management agreements between tribe and non-Indians. Subsequently, all previously certified, tribally-owned businesses complied with this requirement and remained in the program.

In March 1982, the SBA Office of General Counsel issued an opinion which concluded that tribally-owned businesses were not eligible for the program under the criteria established by P.L. 95–507. Focusing on the use of the term "individuals" in the Small Business Act, and the legislative history of the law, the opinion concluded . . .

> absent express statutory authorization, it is our view that 8(a) eligibility must be based upon identifiable disadvantaged individuals; it may not be based solely upon an amorphous ownership by a tribe or public corporation without reference to such individuals.

The effect of this opinion was to deny tribal businesses which had previously been eligible for the program, any further contracts under 8(a). In addition, it meant that no new tribally-owned businesses could be certified.

In June 1982, Senator Andrews introduced S. 2703, a bill to overturn the Administration's newly-announced policy. The Committee did not formally consider S. 2703 during the 97th Congress. However, in October of 1982, the SBA General Counsel reversed his earlier decision and ruled that tribal enterprises were eligible to participate in the 8(a) program under certain conditions. He set forth the procedure for certifying tribes as follows:

> In our view, the eligibility of tribally-owned firms would involve two determinations. First, the tribe itself would have to make a showing satisfactory to SBA that it is economically disadvantaged. This may involve nothing more than reference to available economic data showing the tribe's economic condition. It would not involve a determination as to the social and economic disadvantage of the individual tribe members. The second eligibility determination, however, would involve a finding by SBA that the individual tribal members responsible for the daily management and control of the enterprise are socially and economically disadvantaged. This latter determination could fulfill the statutory goal of fostering the development of entrepreneurs from groups presently owning and controlling little productive capital.

Since the issuance of the General Counsel's opinion, no regulations implementing the decision or guidelines to its field offices have been issued by SBA.

S. 1022

On April 27, 1983, Senator Andrews introduced S. 1022. Even though the General Counsel's October 1982 opinion made tribes eligible for the program under certain conditions, Senator Andrews felt that it was important for Congress to clarify the issue once and for all. Indeed, despite the issuance of the October, 1982 opinion, tribal representatives have advised the Committee that SBA field officers are still saying that tribes are not eligible to participate in the 8(a) program.

Under the provisions of S. 1022, as introduced by Senator Andrews, Indian tribes would be considered presumptively socially and economically disadvantaged for the purposes of being accepted into the program. Also, the bill specifically sanctioned management agreements be-

tween tribally-owned businesses and third parties. Finally, the bill defined an Indian tribe as either a Federally or state recognized entity.

On May 11, 1983, the Small Business Committee held a hearing in Washington, D.C., to consider this legislation. At the hearing, the SBA supported the bill's overall intent to clarify the statute, but voiced concerns about three aspects of Senator Andrew's bill. The Administration's first area of concern was the provision that would give Indian tribes the presumption of economic, as well as social disadvantage. SBA officials pointed out that under the 8(a) program, while certain groups are presumed to be socially disadvantaged, there is not, and never has been, any presumption of economic disadvantage given to any group.

The second concern of the Administration dealt with the statutory authorization of management agreements. SBA officials said they feared that statutorily authorizing management agreements that would give third parties control of the tribally-owned 8(a) firm would resurrect the problem of "front companies" and frustrate the program's main purpose of developing the business skills of socially and economically disadvantaged persons, in this case, members of Indian tribes.

Finally, the Administration expressed some concern about the bill's definition of an Indian tribe. They felt that the definition of either a state or Federally recognized entity was too broad and that it should be limited to allow eligibility for Federally-recognized tribes only.

After negotiations between SBA and Committee staff, a Committee substitute was drafted, addressing some of the issues raised in consideration of the bill. This substitute amendment was adopted by the Committee at the September 20, 1983 mark-up.

THE COMMITTEE AMENDMENT

The Committee amendment addresses the Administration's concerns for maintaining the program's integrity, while also clarifying Congressional policy and intent as to how tribes should be treated in the program. Specifically, the amendment provides that:

Along with Blacks, Hispanics, Asian Pacific Americans and Native American individuals, "Indian tribes" are added to the list of groups designated in the statute as "socially disadvantaged";

The tribe must be found to be economically disadvantaged in order for the tribally-owned business to be certified; and the Agency is given guidance as to the factors to consider in making this determination;

The daily management and control of the tribally-owned business must be by members of the tribe; management agreements are not statutorily sanctioned; and

The definition of an Indian tribe includes both state and Federally-recognized entities.

The Committee amendment codified current Agency policy by recognizing tribes as entities eligible to participate in the 8(a) program on equal terms with businesses owned by other socially and economically disadvantaged persons. Thus, members of Indian tribes will be given the opportunity to develop the skills to operate a business through the 8(a) program.

DISCUSSION OF COMMITTEE AMENDMENT

As previously noted, in order to certify a firm for the 8(a) program under current law, SBA must find (1) that a firm is at least fifty-one percent owned by one or more socially and economically disadvantaged individuals and (2) that the management and daily business operations are controlled by one or more such individuals. Thus the first set of determinations should focus on the economic status of the tribe. Recognizing the unique role of the tribe in Indian life, the Committee amendment requires that the tribe as a whole—instead of the manager(s) of the firm—be found to be economically disadvantaged in order for a tribally-owned firm to be certified.

In Committee hearings, the Administration testified that in order to establish tribal economic disadvantage, they would require nothing more than reference to available economic data showing the tribe's economic status. The Committee amendment provides that in determining the tribe's economic status, the Administration shall consider factors such as rate of unemployment and per capita income of the tribe. Such data is readily available for most tribes from the Bureau of Indian Affairs, the Census Bureau, and in some cases, the tribe itself. The Committee understands that in some cases, tribes may not have ready access to these statistics, and notes that the inability of a tribe to develop this information should not be a barrier to its admission to the program.

The Committee believes that consideration of the foregoing factors will permit tribes to be certified as economically disadvantaged. Concerns have been expressed about the extent to which the Administration will include Indian tribal lands, some of which have valuable mineral resources, and other trust assets, in determining the tribe's economic status. Under the terms of the amendment, the Committee intends that the Administration consider the tribe's access to traditional sources of credit, such as commercial banks and other financial institutions, without regard to trust assets, in judging the economic status of the tribe.

After ascertaining the economic status of the tribe, the second set of determinations of tribal eligibility focuses on the ownership of the tribally-owned firm. Under the Committee amendment, the tribe would be treated in the same manner as all other program participants and would be required to meet the mandate that at least fifty-one percent of the small business concern be owned by socially and economically disadvantaged persons, and that tribal members control the daily operation of the concern.

Under the amendment, managers do not need to be economically disadvantaged. However, in view of past problems in the 8(a) program generally, with front companies, and to protect the tribe from the possibility of being exploited, the Committee anticipates that SBA will require the submission of individual financial data from the person(s) who will manage and control the daily business operations of the firm, as part of the application process. The Committee further expects that SBA will require that such information be updated on a periodic basis.

The Committee fully agrees with and shares the Administration's concerns about "front companies." As Chairman Weicker stated in the hearing on S. 1022:

> I couldn't agree with you more on the second change relative to "front" organizations. We have seen that abused and abused and abused. Certainly, when we have a chance to start from scratch as we do here, I don't want to go ahead and introduce the same possibility into the procedure * * * This is meant to benefit Indian tribes, not meant to benefit somebody who wants to benefit from Indian tribes.

Because of these concerns, the amendment does not statutorily authorize management agreements. Proponents of the management agreement provision argued that in many cases where tribally-owned 8(a) firms operate pursuant to management agreements, the major corporations involved would not have made the necessary capital investment into the companies had such an agreement not existed. This in turn would have meant that hundreds of jobs created on those Indian reservations would not have been created. Furthermore, they pointed out that by deleting the provisions on management agreements from the amendment, those companies currently operating under management agreements could be automatically terminated from the program.

Under SBA's standard operating procedures (SOP 80–05–48), management agreements between an 8(a) concern and a third party are permitted on a case-by-case basis. The agreement must be approved by SBA annually and specific provisions are required to be incorporated into all agreements. In its careful monitoring of these agreements, SBA's overall goal is to assist the socially and economically disadvantaged managers of the concern to develop management and business skills to operate the business. The Committee believes this is a sound policy and that the Administration should continue to permit these agreements on a case-by-case basis. The Committee's intent is not to adversely affect those companies which have existing management agreements, but to maintain safeguards that will ultimately preserve and protect the integrity of the 8(a) program and the tribally-owned firms operating in the program.

Finally, it is the Committee's clear understanding and intent that tribally-owned businesses are subject to the same fixed program participation requirements as other firms in the program, pursuant to Public Law 96–481.

Although the Committee has sought to maintain consistency in the treatment given to tribes and individuals applying for certification in the program, it recognizes that making tribally-owned businesses eligible for the 8(a) program may necessitate other regulatory changes. For example, under existing standard operating procedures, an individual is only permitted to use his or her status as a socially and economically disadvantaged person once to gain entry into the program; by extending eligibility to the tribe, if the same administrative rule were to apply, it would mean that once a tribe received certification, no more than one of its businesses would be eligible for contract assistance. In this situation, the Committee can envision that SBA may want to alter that rule to permit the tribes' status to be used

more than once. The Committee recognizes that such situations may arise, and wants to permit SBA the flexibility to make appropriate regulatory changes as they deem fit.

CONCLUSION

The Committee fully supports the idea that tribally-owned businesses should be eligible to participate in the 8(a) program on equal terms with businesses owned by other socially and economically disadvantaged individuals, to the maximum extent possible. In Committee hearings and staff briefings on this issue, tribal representatives repeatedly raised concerns about how the SBA has denied or discouraged applications by tribally-owned firms. In addition, there were serious allegations that SBA has interrupted program participation of certified tribally-owned businesses. Based on these experiences, there was a wide-spread feeling that anything short of statutorily presuming eligibility would not be satisfactory, and would only result in more denials and interruption of the business operations of certified tribally-owned firms. While the Committee has not endorsed an automatic presumption of eligibility for tribally-owned firms, it fully expects that the Administration will encourage program participation by more tribally-owned businesses. As previously discussed, the Committee's primary concern throughout the 8(a) program generally is to avoid a repetition of past program abuses. In this area, the Committee also wishes to ensure that members of the Indian tribes are the true beneficiaries of tribal participation in the program. In implementing these provisions, the Administration should do everything in its power to ensure that tribally-owned firms' applications are handled expeditiously and that more tribally-owned businesses are approved for participation in the program.

HASIDIC JEWS

The Committee is also concerned about the ability of small businesses owned by socially and economically disadvantaged Hasidic Jews to be certified by the SBA for inclusion in its 8(a) program. Lack of certification of qualified firms not only deprives deserving firms of essential government contracts aimed at business development but also creates a road block to subcontracting opportunities available through the section 8(d) program.

According to SBA's own findings, the social disadvantage of Hasidic Jews is unequivocal and devastatingly apparent in every business life. After extensive factfinding and a review of 151 comments submitted to the Agency, the SBA concluded in an April, 1980 decision that:

> The evidence of prejudice and discrimination experienced by Hasidic Jews is overwhelming and essentially unrefuted;
>
> Employment discrimination experienced by Hasidic Jews is massively documented;
>
> Hasidic entrepreneurs often confront blatant discrimination in the marketplace; and
>
> The same pattern of discrimination against Hasidics that hampers their efforts to seek employment outside their community

and cripples the efforts of Hasidic businessmen to attract potential buyers also permeates the relationship between Hasidic businessmen and commercial lending institutions.

Therefore, the Committee expects SBA to do everything within its power to process individual applications of Hasidic-owned firms for admission into the 8(a) program expeditiously and diligently, on a case-by-case basis. In this regard, the Committee notes that the SBA Administrator has sent directives to the field, stating that all applications for certification for the 8(a) program should be processed within 70 days.

It is also the Committee's expectation, and the Committee intends to ensure through oversight if necessary, that when a Hasidic-owned firm applies for certification into the 8(a) program and makes the requisite showing of social and economic disadvantage, the firm will be expeditiously certified. To the extent that Hasidic-owned firms qualify, the Committee expects that their participation in the program as a group should be increased.

In addition, the Committee expects SBA to work diligently and effectively with the various contracting agencies of the Federal Government to ensure that properly qualified Hasidic-owned firms in fact receive their fair share of contract and subcontract support.

III. Section-by-Section Analysis

The Committee amendment amends three sections of the Small Business Act.

Section 1 of the bill amends Section 2(e)(1)(c) of the Small Business Act by adding the words "Indian tribes" to the list of groups which the statute says are socially disadvantaged.

Section 2 of the bill amends Section 8(a)(4) of the Small Business Act by inserting new language defining the term "socially and economically disadvantaged small business concern" to include a business 51 percent owned, or a corporation whose stock is 51 percent owned, by members of an economically disadvantaged Indian tribe. It also provides that such concern's daily management and control must be by members of the economically disadvantaged tribe.

Section 3 of the bill amends Section 8(a)(6) of the Small Business Act by adding new language that directs the Administration to consider, where such information is available, the per capita income, the Indian population below the poverty level and the tribe's access to capital in determining the economic status of the tribe.

Section 4 of the bill adds a new paragraph 8(a)(13) which defines the term "Indian tribe" as any federally or state recognized band, nation, or other organized community group of Indians.

IV. Matters Required To Be Discussed Under Senate Rules

A. COMMITTEE VOTE

A motion by Mr. Weicker to favorably report S. 1022, with an amendment in the nature of a substitute and an amendment to the title was unanimously agreed to.

B. COST OF THE LEGISLATION

In compliance with rule XXVI(11)(a) of the Standing Rules of the Senate, the Committee estimates that the cost of the legislation will be equal to the amounts indicated by the Congressional Budget Office in the following letter:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 21, 1983.

Hon. LOWELL P. WEICKER, Jr.,
Chairman, Committee on Small Business, U.S. Senate, Russell Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1022, a bill to amend section 8(a) of the Small Business Act to clarify the eligibility of small business concerns owned by Indian tribes, as ordered reported by the Senate Committee on Small Business, September 20, 1983.

S. 1022 would treat certain businesses owned by Indian tribes as socially and economically disadvantaged small business concerns for the 8(a) minority programs administered by the Small Business Administration. Enactment of this legislation is not expected to result in any budget impact to federal, state, or local governments.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely, RUDOLPH G. PENNER, *Director.*

C. REGULATORY IMPACT STATEMENT

In compliance with rule XXVI(11)(b) of the Standing Rules of the Senate, it is the opinion of the Committee that no significant additional regulatory impact would be incurred in carrying out the provisions of the legislation. Nor does the Committee believe that the bill would have an additional impact on the privacy of, or result in any additional paperwork for companies that participate in the Section 8(a) minority business development program.

V. CHANGES IN EXISTING LAW

In compliance with rule XXVI(12) of the Standing Rules of the Senate, changes in existing law made by the statutory provisions of the bill are as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, and existing law in which no change is proposed is shown in roman):

SMALL BUSINESS ACT

* * * * * * *

SEC. 2(e)(13) * * *

(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, *Indian tribes*, Asian Pacific Americans, and other minorities;

* * * * * * *

SEC. 8(a) * * *

(4) *(A)* For purposes of this section, the term "socially and economically disadvantaged small business concern" means any small business concern *which meets the requirements of subparagraph, (B) and—*

[(A)] *(i)* which is at least 51 per centum owned by—

(I) one or more socially and economically disadvantaged individuals; or,

(II) an economically disadvantaged Indian tribe, or

(ii) in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by—

(I) one or more socially and economically disadvantaged individuals [; and], *or*

(II) *an economically disadvantaged Indian tribe.*

(B) [whose management and daily business operations are controlled by one or more of such individuals.] *A small business concern meets the requirements of this subparagraph if the management and daily business operations of such small business concern are controlled by one or more—*

(i) socially and disadvantaged individuals described in subparagraph (A)(i)(I) or subparagraph (A)(ii)(I), or

(ii) members of the economically disadvantaged Indian tribe described in subparagraph (A)(i)(II) or subparagraph (A)(ii)(II).

* * * * * * *

(6) Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities the Administration shall consider but not be limited to, the assets and net worth of such socially disadvantaged individuals.

In determining the economic disadvantage of an Indian tribe, the Administration shall consider, where available, information such as the following: the per capita income of members of the tribe excluding judgment awards, the percentage of the local Indian population below the poverty level, and the tribe's access to capital markets.

* * * * * * *

SEC. 8(a) * * *

* * * * * * *

(13) For purposes of this subsection, the term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act) which—

(A) is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or

(B) is recognized as such by the State in which such tribe, band, nation, group, or community resides.

ADDITIONAL VIEWS OF MR. BAUCUS

During the Committee's consideration of this legislation relating to Indian tribal eligibility for the Small Business Administration's 8(a) minority business development program, I had intended to offer a substitute amendment.

Under the Committee-reported bill, Indian tribes, as an entity, are to be statutorily included in the 8(a) program by being presumed to be socially disadvantaged, and providing that the tribe can meet certain simple tests of economic disadvantage.

To the best of my knowledge, this is the first time that "groups" will be included in the 8(a) program, a program which has up until now been limited to "individuals," including Native American individuals.

I recognize the need for legislation clarifying the status of tribes in the 8(a) program. I share the concerns expressed by Senator Andrews, the tribal representatives who testified before our committee recently, and others, that Indian tribal businesses have received less than fair and favorable treatment by the Small Business Administration. Their skepticism of the agency's real interest on their behalf is deep, and in my view susbtantially justified.

There is no question that Indian tribal enterprises confront blatant discrimination in the marketplace; tribal businesses are virtually precluded from access to the commercial markets for a wide variety of reasons. In addition, these firms frequently produce goods specifically and solely for the Federal Government, and there is not much of a commercial market for Army camouflage, for example, the primary product manufactured by the Devils Lake Sioux in North Dakota and A&S Industries at the Fort Peck Reservation in Montana.

I have no objection to the Committee's formulation provided that that is the policy that members believe is best suited for the tribes. I share my colleagues' view that the amendments Congress enacted in 1978 have enhanced the 8(a) program for individuals by making it a business development, not a contract assistance, program. But for tribal businesses now, in 1983, that contract support is virtually all that can be used, and all that is asked for.

My substitute would have recognized that Indian tribal businesses are unique among those that seek to use the 8(a) contracting mechanism as a means for business development. Under my amendment, tribes would be able to take full advantage of the authority given to the Small Business Administration to contract with other Federal agencies for the delivery of goods and the performance of services, and then subcontract that procurement requirement to them. My amendment would thus permit the Department of Defense, for example, to continue to provide meaningful contracts to the tribes.

However, my amendment would not statutorily presume that tribes are "socially disadvantaged", nor require SBA to apparently make substantively meaningless determinations of a tribe's "economic dis-

advantage." My amendment would not require that the existing 8(a) program be substantially modified to accommodate the unique characteristics of tribally-owned businesses.

Including tribes within the 8(a) program, and expecting them to meet the program requirements properly imposed on all 8(a) participants to demonstrate a decrease in 8(a) contract support and an increase in non-8(a) work during their fixed program participation, fails to acknowledge the impossibilities faced by tribally-owned enterprises in developing commercial markets.

Including tribes within the 8(a) program and expecting them to "graduate" within the fixed program participation period of not more than seven years ignores the business and economic realities that tribal enterprises face every day, and cannot overcome on their own.

It is my hope that the legislation approved by the Committee will meet the needs and concerns of the tribes. Within the constraints of the 8(a) program, I hope that SBA will recognize the special problems that tribally-owned businesses face, address the special characteristics of the tribes at this point in their economic development, and be sensitive to their needs. Furthermore, it is my hope that the Small Business Administration will make a special effort to directly involve the tribes as the agency establishes any special program guidance for itself and for the Federal procurement agencies.

I want to assure my colleagues that there will be a need for vigilant oversight of this Administration's actions to fully and fairly implement this law, and the tribes' participation in the program. If the agency is not able to satisfactorily implement these provisions, I will be prepared to pursue my amendment at any time.

I appreciate the Committee's attention, and efforts, in this important area of Indian tribal economic development.

MAX BAUCUS.

ADDITIONAL VIEWS OF MESSRS. DIXON AND LEVIN

During the Committee's consideration of this bill, we offered an amendment that would add women business owners as an identifiable group to the subcontracting provisions of the Small Business Act. We agreed to withdraw the amendment to provide the Committee with an opportunity to review how this amendment would be implemented. It is our intention to pursue this amendment when the bill is considered by the full Senate.

The need for this amendment was highlighted by Congressional action taken last December on the Surface Transportation Act. At that time, it was brought to our attention that women-owned businesses were not included within the list of small business concerns "presumptively eligible" to participate in the Department of Transportation's (DOT) Minority Set-Aside program. Arguably, with expensive legal action proving cultural bias, women business owners could prove themselves to be eligible under the 1982 Act.

Without addressing the question of eligibility for that DOT program, our amendment is simply designed to recognize that businesses owned and controlled by women are statutorily permitted to take advantage of the benefits of the Federal contracting programs which Congress established in 1979. The amendment does not add women to the SBA 8(a) program; nor in our view does it open the door to their eligibility. Under our amendment, women would have to meet the same requirements that other small and small disadvantaged businesses must meet to participate under the provisions of the Small Business Act, namely, that 51 percent of the business is owned by women and that the business' day-to-day activities are controlled by those women.

There are many reasons to support the amendment. Women in business have experienced disadvantages in access to Federal procurement opportunities, and sections 8(d) and 15 of the Small Business Act were designed to provide a straight forward mechanism to redress those impediments. Section 8(d) refers to a prime contractor using its "best" efforts in subcontracting only, and in our view the inclusion of women business owners will not "harm" other beneficiaries of the program.

Finally, adding a specific reference to women business owners clarifies the 1978 legislative history concerning their eligibility for these programs. As an example, the conference committee report on the legislation that put section 8(d) into the law states that:

> The Committee intends that SBA give most serious consideration to, among others, women business owners. *The Committee notes that sex discrimination, whether overt or subtle, does result in business impediments which are not generally common to all small business owners.* (emphasis added)

The amendment will statutorily recognize a special segment of women, namely women business owners, and there is ample evidence that this sub-group has been subjected to discrimination as business owners. But we are not asking the Committee, or the Congress to address the issue of whether women business owners are disadvantaged.

We do not believe that it was a specific Congressional intent to exclude non-minority women business owners from benefitting from these Small Business Act provisions along with other minority business owners. However, that is how the Act is being implemented. Therefore, this simple modification to sections 8(d) and 15 of the Small Business Act, will insure that non-minority women will be given the same opportunities to participate in Federal government contracts and subcontracts.

The Administration has also recognized the unique problems faced by women business owners. In fact, when the President recently announced his national initiative program to assist women entrepreneurs, one of the program's stated rationales was that "women business owners need equitable opportunities." This amendment begins that process, and we urge our colleagues' support.

This amendment is supported by the National Association of Women Government Contractors, the National Association of Women Business Owners, the National Association of Women Business Owners Capital Area Chapter, the Professional Women in Construction, Non-Traditional Employment for Women, the National Association of Women in Construction, and the O'Hare/Suburban Illinois Chapter No. 193 of the National Association of Women in Construction.

ALAN DIXON.
CARL LEVIN.

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